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Supreme Court of the United States

OCTOBER TERM, 1943

No. 154

ANDERSON NATIONAL BANK, Suing on Behalf of Itself and All Others Similarly Situated, - - Appellants,

vs.

H. CLYDE REEVES, Individually and as Commissioner of Revenue of the State of Kentucky, Etc., Et Al, - - - - - - - - - - Appellees.

Appeal from the Court of Appeals of the State of Kentucky

BRIEF FOR APPELLEES

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Supreme Court of the United States

October Term, 1943

No. 154

ANDERSON NATIONAL BANK, SUING ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, - - - - - - - - *Appellants,*

vs.

H. CLYDE REEVES, INDIVIDUALLY AND AS COMMISSIONER OF REVENUE OF THE STATE OF KENTUCKY, ETC., ET AL., - - - - - - *Appellees.*

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF FOR APPELLEES

STATEMENT OF THE CASE

This case comes before this court on an appeal from a judgment of the Kentucky Court of Appeals affirming a final judgment of the Franklin Circuit Court holding that appellants were not entitled to an order or decree enjoining respondents from enforcing certain parts of Chapter 79 of the Kentucky Acts, 1940, as amended by Chapter 156 of the Kentucky Acts, 1942[1]. It was appellants' contention that said parts of the Act[2] were unconstitutional.

The Kentucky Court of Appeals rendered two opinions in the case which are reported in 293 Ky. 735, 170 S. W. (2d) 350 and 294 Ky. 674, 172 S. W. (2d) 575. The second opinion merely affirms the first.

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[1] Sections 393.010 to 393.990, inclusive, Kentucky Revised Statutes.

[2] This Act will be referred to hereinafter as "the Act."

No question is raised on this appeal as to the validity of sections 3, 4, 5 and 6[3] of the Act or the provisions of other sections of the Act in so far as they apply only to said sections 3, 4, 5 and 6[4]. These unquestionably valid parts of the Act are referred to herein because some knowledge of them is essential to a full understanding of the controversy in this case.

They provide in snbstance that the state may take *a defeasible title* to property under the following circumstances: (1) Death of the owner intestate without heirs; (2) failure of a devisee or the heir or distributee of a devisee to claim a legacy within eight years after death of the devisee;[5] (3) actual abandonment of property by the owner;[6] (4) presumption of death without heirs or devisees or distributees where the owner of property "is not known to be living for seven (7) successive years, and neither said owner, his heirs, devisees, or distributees can be located or proved to have been living for seven (7) successive years. . . . ."[7]

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[1] Sections 393.020, 393.030, 393.040 and 393.050, Kentucky Revised Statutes.

[2] See the first two paragraphs of the opinion of the Kentucky Court of Appeals [170 S. W. (2d.) 350]. Appellants attempted to assail the validity of the above provisions in their petition, but admittedly abandoned in the Franklin Circuit Court, before the case even reached the Court of Appeals, any contention that said provisions were invalid.

[3] Grounds 1 and 2 were held valid in Commonwealth v. Schult, 268 Ky. 806, 105 S. W. (2d) 1067; Commonwealth v. Unknown Heirs of Haynes, 188 Ky. 256, 221 S. W. 541; Louisville School Board v. Chicago, St. Louis & N. O. R. R. Co., 124 Ky. 497, 99 S. W. 596; Bank of Louisville v Board of Trustees, 83 Ky. 219; Commonwealth v. Blanton's Executors, 41 Ky. (2 B. Monroe) 393. Ground 1 first appeared in the Kentucky Statutes in Chapter 86, Acts of the General Assembly (1839-40). Ground 2 first appeared in an amendment in 1854 of the Acts of 1842. (See General Statutes, Kentucky, 1873, Ch. 36, p. 404.)

[4] Ground 3 was not in the 1936 edition of Ky. Stats. For definition of "actual abandonment" see Stinett v. Kinslow, 238 Ky. 812, 39 S. W. (2d) 1006; Rice v. Rice, 243 Ky. 827, 50 S. W. (2d) 26.

[5] Ground 4 was held valid in Commonwealth v. Thomas' Adm'r., 140 Ky. 789, 131 S. W. 797; Louisville School Board v. Bank of Ky., 86 Ky. 150, 5 S. W. 739. This provision is amendatory of an Act of 1884 and was enacted substantially in its present form in 1893. (See sec. 1609, Ky. Stats., 1936 edition.)

The state can never take property on any of the above grounds except pursuant to a court judgment obtained in accordance with the Civil Code of Practice.[8] Even when property is so taken, "any person claiming an interest therein, and who was not actually served with notice and did not appear in the proceedings, may within five (5) years after the judgment file his claim to recover same with the Department of Revenue." *Anderson National Bank v. Reeves*, 293 Ky. 735, 170 S. W. (2d) 350. See KRS 393.140.

Thus on any of the above grounds, the state takes title to the property subject to defeasance at any time within five (5) years.

Other sections of the Act provide that particular classes of property *under certain circumstances* are presumed abandoned and provide a procedure whereby the state takes *custody only (not title) of such property* to conserve same *forever* for the benefit of anyone having an interest therein. It is the validity of *some of these provisions relative to property presumed abandoned* which is brought into question on this appeal. The true import of these provisions must be ascertained for they, in reality, constitute the facts on which this litigation is based. We believe that the Kentucky Court of Appeals has in its opinion clearly stated and construed the provisions of the Act, but, we do not agree with the construction placed on the court's opinion on the Act in appellants' assignment of errors. The basic provisions of the Act as we see them may be summarized as follows:

A. Section 7[9] of the Act sets out *all* the grounds and circumstances which give rise to a *presumption* that *any* property is abandoned. It provides:

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[8] No contention is made by appellants that the Kentucky Civil Code of Practice denies due process of law.

[9] Sections 393.060 to 393.100, inclusive, K.R.S.

(1) That where the owner of bank deposits *payable on demand* have not for ten (10) successive years next preceding the date for making reports as required by the Act (a) negotiated in writing with the bank or trust company in respect thereto, or (b) been credited with interest on the passbook, or certificate of deposit, on his request, or (c) had a transfer, distribution of interest, or other transaction noted of record in the books or records of such bank or trust company, or (d) increased or decreased the amount of deposit, such deposits and the interest thereon shall be presumed abandoned.

(2) That a presumption of abandonment also arises with respect to deposits *not payable on demand* on the same grounds set out in (1) above, except that the period of time is twenty-five (25) successive years instead of ten (10).

(3) That all moneys, stocks, bonds, or other credits deposited to secure payment for services rendered or to be rendered, or to guarantee the performance of services or duties, or to protect against damage or harm, are presumed abandoned unless claimed by the person entitled thereto within ten (10) years *after the occurrence of such event as would obligate the holder or depository to return the same or the equivalent thereof to the proper owner or claimant.*[10]

(4) That all intangible property held within this state by any person *for the benefit of another person* shall be presumed abandoned unless claimed by the beneficiary or person entitled thereto within ten (10) years *from the time the holder, trustee, debtor, or other responsible person be-*

[10] Deposits made with utility companies to guarantee payment of service are a good example of the class of property covered by this provision.

came obligated to return the same or the equivalent thereof to the proper owner or claimant.[11]

(5) That when any estate or property is paid into any court of this Commonwealth for distribution, it is presumed abandoned if not claimed within five (5) years after same was paid into the court or as soon after said five-year period as all pending claims shall have been closed or settled by the court.

B. Section 8[12] of the Act, as amended in 1942 by Chapter 156, Acts of 1942, provides in substance as follows:

That all persons holding property declared by the Act to be presumed abandoned must report same to the Department of Revenue annually as of July 1. The report is due on or before September 1 of each year and must be made in duplicate. The copy must be posted on the courthouse door or bulletin board on or before October 1 of each year. The Act expressly provides that said publication "shall be constructive notice to all interested parties *and shall be in addition to any other notice provided by statute or existing as a matter of law.*" The person reporting the property is required to turn it over to the Department of Revenue between November 1 and November 15 of each year except that "*if the person making the report or the owner of the property shall certify to the Department by sworn statement that any or all of the statutory conditions necessary to create a presumption of abandonment no longer exist or never did exist or shall certify the existence of any fact or circumstance which has a substantial tendency to rebut such presumption, then, the person reporting or holding the property shall not be required to turn the property over to the Department except on order of court.* No person shall be required to surrender any property on

[11] This section covers dry trusts, bailments and pledges where the property is not claimed within ten (10) years after its true owner was entitled to a return thereof. It does not apply to the ordinary creditor-debtor relationship, because the debtor is not holding property for the benefit of any person; nor does it apply to any active trust, pledge, or bailment.

[12] Section 393.110 K.R.S.

a presumption of abandonment to the Department if the period of time provided by any statute of limitation applicable to the owner's rights as against the holder has expired unless the court orders him to do so. . . . The person reporting or holding the property or any claimant thereof shall always have the right to a judicial determination of his rights under this Act and nothing therein shall be construed otherwise; *and the Commonwealth may institute an action to recover such property as is presumed abandoned whether it has been reported or not and may include in one petition all such property within the jurisdiction of the court in which the action is brought provided the property of different persons is set out in separate paragraphs.*"

C. Section 17[14] of the Act provides:

That all money received by the Department of Revenue under the provisions of the Act must be deposited with the State Treasurer and credited to the account of the General Expenditure Fund.[14]

D. Section 11[15] of the Act provides:

That any person claiming an interest in any property turned over to the State on the ground that it was presumed abandoned may claim it "*at any time after same was paid to this Commonwealth.*" Thus, there is absolutely no time limit on the filing of a claim for a refund of property *presumed abandoned.*

E. Section 12[16] of the Act provides:

That if a claimant establishes his right to property presumed abandoned, the Commissioner of Revenue must authorize payment to him of a sum "*equal to the same*

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[13] Section 393.250 K.R.S.

[14] The Act provided that 10% of such sum as is paid to the State Treasury for the fiscal years beginning July 1, 1940, and July 1, 1941, should be added to the appropriation of the Department of Revenue. This provision can never take effect because the time when it would have been effective has expired, and the provision has been eliminated in K.R.S.

[15] Section 393.140 K.R.S.

[16] Sections 393.150, 393.160 K.R.S.

amount which was paid into the State Treasury in compliance with this Act." Any person dissatisfied with the decision of the Commissioner has two alternatives: (1) he may within sixty (60) days appeal to the Franklin Circuit Court, or (2) he may within sixty (60) days file an action in said court to vacate such decision. In either event the proceedings are *de novo*. Any party adversely affected by the decision of the Franklin Circuit Court may appeal to the Kentucky Court of Appeals.

F. Section 10[17] of the Act provides as follows:

"Any person who shall transfer to the Department of Revenue, property to which the Commonwealth is entitled under the provisions of this Act, is hereby relieved of any liability to the owner of such property arising from such transfer; however, if any such person cannot be relieved of such liability by the provisions of this section, the Commonwealth shall reimburse such person for all liability to the owner of the property or estate or damage incurred by reason of compliance with the provisions of this Act."

G. Sections 14, 15, and 16[18] of the Act set out the procedure for enforcing all the terms of the Act. The procedure for enforcing sections 3, 4, 5, and 6[19] of the Act is entirely different from the procedure for enforcing the sections of the Act which relate to property presumed abandoned.[20] The county attorney has duties to perform with respect to the enforcement of sections 3, 4, 5, and 6, and receives a fee for his services. However, he has no duties with respect to sections 7 and 8,[21] which relate to property *presumed abandoned*. No fees are allowed to anyone in connection with property presumed abandoned, and no

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[17] Section 393.130, K.R.S.

[18] Sections 15.140, 393.180, 393.190, 393.200, 393.210, 393.220, 393.230 and 393.240, K.R.S.

[19] Sections 393.020, 393.030, 393.040 and 393.050, K.R.S.

[20] It will be remembered that sections 3, 4, 5, and 6 of the Act set out the grounds which entitle the state to a defeasible title. Such title must be established by court procedure, except perhaps in rare instances not here material. See cases cited at page 2 hereof.

[21] Sections 393.060 to 393.110, K.R.S.

costs or expenses or other amounts are deducted from any property voluntarily turned over to the State on a presumption of abandonment. The last paragraph of section 16[22] of the Act provides: "*The procedure for any and all actions or proceedings permitted or necessary under this Act to be filed in a court of competent jurisdiction shall be the same as that now provided in Carroll's Kentucky Civil Code of Practice, unless provided differently herein, except that all such actions or proceedings shall be filed as equity actions.*"

The provisions of the Act relative to bank deposits presumed abandoned are the ones most violently assailed in appellants' petition and brief. Their petition is replete with lengthy *distorted* statements of the provisions of the Act, conclusions of law and even questions. It is more in the nature of a brief than a petition. Actually, the petition fails to allege that the appellants have any property coming within the terms of the Act. The nearest appellants come to making such an allegation appears at pages 10 and 11 of the printed record where it is stated "Plaintiff and each of those for whom it sues have deposits and or other property that *would or might* come within the terms of the Act." Plainly, all appellants said in this statement was that they "*might*" have property coming within the terms of the Act. Even if they had affirmatively alleged that they did have such property, the allegation would have been a mere conclusion. They should have alleged the facts (if any) which bring their property within the terms of the Act. Although respondents (defendants below) filed a general demurrer to this petition, they, in their brief in the Kentucky Court of Appeals, waived the demurrer *to a limited extent* by stating that they were willing to treat the petition as if facts had been stated therein sufficient to show that appellants held *both types of bank deposits* declared by the Act to be presumed abandoned. But for

[22] Sections 393.230 and 393.240, K. R. S.

this waiver, the Kentucky Court of Appeals would most probably have sustained the demurrer.

Because of this faulty petition and because of appellants' failure in their brief to discuss the validity of the provisions of the Act relative to any class of property presumed abandoned other than bank deposits, we do not believe that the validity of any provisions of this Act is in issue except those relating to bank deposits *presumed abandoned*.

We find no argument in appellants' brief dealing specifically with any class of property other than bank deposits. *For example*, appellants advance no argument to the effect that the State of Kentucky may not under this Act take custody of money paid into one of its courts for distribution when such money has remained unclaimed for five (5) years. *The fact that the officers of the court have, at least presumptively, exhausted all of the court processes for finding the owner of or a claimant to such property* obviously distinguishes the due process question relative to such property from the due process question relative to bank deposits. Similar distinctions can be made with respect to other classes of property presumed abandoned. But, *since appellants do not in their argument discuss with any particularity any class of property except bank deposits*, we doubt that we should do so. It is fundamental that this Court will not consider an assignment of error *even where it appears in the record* if it is not mentioned in the argument. *Southeastern Express Company* v. *Miller* and *Southeastern Express Company* v. *Roberts*, 264 U. S. 541, 68 L. ed. 840. Furthermore, the Act is presumed valid in every detail, and appellants have the burden of showing that it is not. We have no desire to dodge any argument or issue in the case, but we do want to confine the brief to the real issues involved. We shall, therefore, direct our argument primarily to the proposition whether the pro-

visions of the Act dealing with dormant bank deposits[23] are constitutional.[24] The answer to this proposition will, in final analysis, turn entirely on two questions of law, viz.: (1) Whether said provisions of the Act deny due process of law and (2) whether said provisions are applicable to national banks.

HISTORY OF THE PROCEEDINGS BELOW

The appellants, plaintiffs below, Anderson National Bank of Lawrenceburg, Kentucky, Suing on Behalf of Itself and All Others Similarly Situated, alleged in their petition that Chapter 79, Acts of the General Assembly of 1940, is unconstitutional in its entirety and sought a permanent and perpetual injunction enjoining the appellees from enforcing the Act. Respondents, defendants below, filed a motion to strike large portions of the petition. The motion was sustained, and thereafter respondents filed a general demurrer to the petition. The demurrer was overruled, respondents excepted and filed an answer to which appellants demurred.

When the cause came on for hearing on the demurrer, the court expressed the opinion that the part of the Act which dealt with property "*presumed abandoned*" "*denied due process of law to the owners (not the holders) of such property solely for the reason that it failed to provide sufficient notice to such owners.* The court, therefore, held only said part of the Act unconstitutional, and permanently enjoined appellees from enforcing same. The court's

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[23] Bank deposits of the character described in section 7 of the Act (393.060, K.R.S.) for the sake of brevity are referred to hereinafter as dormant bank deposits.

[24] However, we do not urge that the issue be limited as above set out. We take no exception to appellants' attacking the validity of any provision of the Act, whether they technically have the right to do so or not, because we sincerely believe that the Act is constitutional in its entirety and respondents have no desire to enforce any provision thereof which is for any reason unconstitutional. But we do think we are within our rights in insisting that appellants first present an argument to the effect that a substantive provision of the Act is invalid before we are required to present any argument in support of its validity.

order granting said injunction was entered January 30, 1942, the last day of the January term of the Franklin Circuit Court.

In March 1942, the legislature amended section 8[25] of the 1940 Act *which dealt with notice.* This section formerly required persons holding property presumed abandoned to make a single report thereof to the State, and did not require a copy of the report to be posted anywhere. The section as amended requires that the report be made in duplicate and that the copy be posted on the courthouse door or bulletin board of the county where the property is located. Another provision in section 8[25] as amended which was not in the 1940 Act is that *the State can bring an action to recover property presumed abandoned irrespective of whether it has been reported or not, and can include in one action all such property within the jurisdiction of the court in which the action is brought, provided the property of different owners is set out in separate paragraphs.*

After the amendment, Respondents, without conceding that the 1940 Act was ever unconstitutional in any respect, moved the Franklin Circuit Court to dissolve the aforesaid order of January 30, 1942, for the reason that the amendment had removed the constitutional objection which that court found to the 1940 Act. Appellees also filed an amended answer to which appellants filed a general demurrer.

On May 30, 1942, the Franklin Circuit Court, *being of the opinion that the part of the amendment which authorized the collective suit was constitutional,* and that the part of the Act, which requires a voluntary delivery of the property to the State in the absence of the affidavit mentioned in section 8[25] thereof, was unconstitutional solely because the Act, even as amended, *did not provide that adequate notice be given the owners of the property,* entered an order setting aside the order of January 30,

[25] Section 393.110, K.R.S.

1942, and permanently enjoined defendants from insisting on or accepting a voluntary delivery of property presumed abandoned without first filing a suit and procuring a court order for delivery thereof. *At the same time the court declined to enjoin appellees from requiring appellants to make reports of property presumed abandoned, and also declined to enjoin defendants from filing suits, as provided in the Act, to recover property presumed abandoned, whether reported or not.*

Appellants excepted to the judgment on three grounds, viz: (1) That the Act, if valid, could not apply to deposits made before the effective date of the Act; (2) that deposits in national banks could not be taken on a presumption of abandonment; and (3) that appellants and those for whom they sued could not be required to file the report provided for in section 8[26] of the Act. These exceptions were the basis for appellants' appeal to the Kentucky Court of Appeals.

Respondents excepted to the judgment in so far as it held any part of the Act unconstitutional or enjoined the enforcement of any part thereof, and took a cross-appeal to the Kentucky Court of Appeals.

The Kentucky Court of Appeals reversed the lower court on the cross-appeal, affirmed the lower court on the appeal, and issued its mandate accordingly. The lower court (the Franklin Circuit Court) entered its judgment in accordance with the mandate of the Kentucky Court of Appeals. A perfunctory appeal was taken from that judgment to the Court of Appeals, and it was affirmed by that court in *Anderson National Bank* v. *Reeves*, 294 Ky. 574, 172 S. W. (2d) 575. This appeal is prosecuted from that judgment.

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[26] Section 393.110, K.R.S.

APPELLANTS ASSIGNMENTS OF ERROR DISCUSSED

Beginning at page 92 of the printed record, appellants set out eleven (11) assignments of error which are repetitious and overlapping to a high degree, and, *in our judgment, show that appellants have in some material respects misconstrued the opinion of the Kentucky Court of Appeals.*

In several of the assignments of error the court is charged with making certain holdings which it seems not to have made at all. For example, in appellants' 4th assignment of error, it is charged that the court erred "in holding that said statutes, as construed by the Court of Appeals as requiring all persons in Kentucky who hold personal property for the benefit of another, and which has been unclaimed for a period of ten years must, under heavy penalty, voluntarily turn over such property to the Department of Revenue without suit, notice or judicial (fol. 173) decree, are not violative of the due process clause of the 14th Amendment of the Constitution of the United States."[27] We find no support in either the opinion of the court or the Act for the assertion made in the assignment of error. What the appellants probably have in mind is the provision in the Act to the effect that where property is held for the benefit of another and is not claimed within ten (10) years *after the person for whom it is held became entitled to a return of the property or the equivalent thereof, it is presumed abandoned.* Obviously, this provision relates to the corpus of dry trusts, but said assignment of error indicates that the court held it applied to the corpus of active trusts. This is a very significant difference.

In several of the assignments of error, it is stated that the Kentucky Court of Appeals held that the State of Ken-

[27] See also the 1st assignment of error for a repetition of this charge.

tucky could "take or *escheat* deposits in banks on account of inactivity." The court really held that the State cannot under any circumstances *escheat* a deposit in either a state or national bank on the ground of *mere inactivity or dormancy* and that it cannot *escheat* property *on any ground without* judicial proceedings. In this connection the court said:

> "Since the act in controversy does not provide for for an escheat of deposits by reason of *mere dormancy*,[28] as did the California statutes, (title being vested in the state only after judicial determination of actual abandonment) and since the depositor may at any time before actual abandonment is adjudged (and five years thereafter if he was not served with actual notice) secure a return of his deposit from the state, it is our opinion that the Act has no tendency to cause depositors to hesitate on account of apprehended fear of confication to make deposits in national banks. This being true, there is no unwarranted interference with such banks, and no frustration of the purpose of national legislation concerning them such as to render the Act invalid as to them."

It is also implied in several of the assignments of error that the court held that the State of Kentucky could take custody of property presumed abandoned without any notice to the owner. What the court actually held was that the Act did not deny due process of law, and from the cases cited in support of the holding, it is clear that the court was convinced that the owner of such property had adequate constructive notice for the taking of custody of his property. These cases show that such owner has not merely one adequate notice but several. Thus it appears that the answer to several of appellants' assignments of error is that they are predicated on a misconstruction of the written opinion of the Kentucky Court of Appeals.

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[28] Court's emphasis

SUMMARY OF ARGUMENT

Due Process

Our argument on due process may be summarized as follows:

(1) Dormancy or inactivity of property in the sense that there has been no act of ownership over it for a long period of time constitutes reasonable grounds to support legislation designed to make some disposition of such property in the interest of the general welfare.[29]

(2) There is no material deprivation of property under the provisions of the Act in controversy and, therefore, the due process clause is not even involved.

(3) But, if there is a deprivation, it is slight and the owner of the property has notice adequate to satisfy the due process clause of the Fourteenth Amendment for the following reasons:

(a) The proceeding is in rem and seizure of the res is notice;

(b) The statutes themselves are constructive notice and afford a reasonable opportunity for a hearing because they are entirely prospective in their effect;

(c) Seizure of the res and the prospectiveness of the statutes conjointly satisfy due process even if one of them standing alone is insufficient;

(d) The copy of the report of property presumed abandoned must be posted on the courthouse door at least one (1) month before any property is required to be delivered voluntarily to the state. Such voluntary delivery is required only in the absence of the affidavit described in section 8[30] of the Act. Hence the owner of any property presumed abandoned has at least one (1) month after the notice is posted in which to make a simple, inexpensive affidavit which will take his property completely without the purview of the Act. The antiquity of this form of notice

[29] This appears to be admitted by appellants.
[30] Section 393.110, KRS.

in statutes of this character in Kentucky also supports its adequacy.

(4) Although the Kentucky Court of Appeals held that the publication on the courthouse door was not necessary to satisfy the due process clause, it did not hold that the notice should not be posted as required by the Act. Therefore, it *must* be given; and this court, if it should be of a mind to overrule the Kentucky Court of Appeals on this particular holding, should determine the adequacy of this courthouse door publication *under all the circumstances* of the case.

(5) If the court should conclude that there is a material deprivation of property when it is voluntarily delivered to the state under this Act and that none or all of the notices set out in (2) above satisfy due process, then, the banks or other holders of property presumed abandoned would not be relieved of the obligation to report the property. They would merely be relieved of the duty to deliver it voluntarily to the state *when the affidavit mentioned in section 8*[31] *of the Act is not made.* The banks or holders of such property would still be subject to the court action authorized by section 8[31] of the Act to establish *by court judgment* the state's right to take *custody only* of property on the grounds of dormancy set out in section 7[32] of the Act.[33] It is provided that this action must be pursuant to the Kentucky Civil Code of Practice and there is no intimation in appellants' brief or assignments of error that this Code procedure does not meet all tests of due process. Hence, on the pleadings and record, the fartherest this court could go in the way of a decision adverse to respondents on the due process question would be to hold that the Kentucky Court of Appeals erroneously upheld the valid-

[31] Section 393.110, K.R.S.
[32] Section 393.060, K.R.S.
[33] This ground should not be confused with such grounds as death intestate without heirs or actual abandonment on which a defeasible title is taken pursuant to a court judgment procured in accordance with the Kentucky Civil Code of Practice and over which there is no question of validity.

ity of the requirement of the Act for a voluntary delivery of property presumed abandoned. Such a holding would merely mean, so far as concerns the due process question, that the Court of Appeals erred in reversing the Franklin Circuit Court on the cross-appeal.

(6) A judicial determination is not an indispensable requirement of due process. All that is required is a reasonable opportunity to be heard.

(7) A bank depositor has more protection under this Act when his deposit is delivered to the state voluntarily than when it is delivered pursuant to a court judgment. Hence, a judicial determination that a deposit is dormant would serve no useful purpose.

The National Bank Question

(1) This court said in effect in the *San Jose* case that the California statutes attempted to confiscate deposits solely on the ground of dormancy and that they might have the effect of causing people to hesitate to place deposits in national banks where they would be subject to possible confiscation. The Kentucky statutes *conserve* deposits on the ground of dormancy instead of *confiscating* them on said ground. Therefore, the Kentucky Statutes will not have the same adverse effect on national banks which was attributed to the California statutes.

(2) It was on the basis of this distinction that the Kentucky Statutes were held valid by the Kentucky Court of Appeals. It will be our contention that this is a sound distinction of great legal significance and that the judgment of the Kentucky Court of Appeals should be affirmed. At least, we feel confident that because of this distinction, the *San Jose* case will not be considered by this court to be conclusive of the case at bar.

(3) Although it is not essential to a decision on this appeal favorable to respondents that the *San Jose* case be overruled, it will be suggested in argument that *the*

case should be overruled because the adverse effect which this court said the California statutes would have on national banks is insubstantial and too speculative in the light of more recent decisions of this court dealing with the general question of intergovernmental immunities to constitute a sound basis for holding the California Statutes invalid.

ARGUMENT

The Act Does Not Deny Due Process of Law

In *Provident Institution for Savings* v. *Malone*, 221 U. S. 660, 55 L. ed. 899, this court considered the validity of a Massachusetts statute, the substance of which was in the language of the court as follows:

> ". . . That deposits in savings banks which had remained inactive and unclaimed for thirty years, and where the claimant was unknown or the depositor could not be found, should be paid to the treasurer and receiver general.
>
> ". . . Before the money can be turned over to the receiver general, proceedings must be instituted in the probate court, and, under the decision of the supreme court of the state, personal notice must be given to the bank, and citation and notice, usual in the probate court, published, so as to give the depositor, if living, and his heirs, if dead, opportunity to appear and be heard. Even then the property is not escheated, but deposited with the treasurer, to hold as trustee for the owner or his legal representatives, to whom it is payable when they establish their right."

This court held that the statute did not deny due process of law or impair the obligation of contracts. The reasons for the court's conclusion are concisely set out in the following statement from the opinion:

> ". . . Savings banks are maintained, in the expectation that the deposits may, for years, remain uncalled for, to the mutual advantage of bank and customer. So that, if the statute had provided that the money should be paid over to the receiver general if the owner, after a short absence, could not be found, or if the account remained inactive for a brief period, a very different question would be presented from that arising under an act which deals with absence and non-action so long continued as to suggest that the law of escheats or of lost property might be enforced. This, however, is not a statute of escheats, since it does not proceed on the theory that the depositor is dead, leav-

ing no heirs. It does not purport to dispose of lost property, but deals with a deposit the owner of which, though known, cannot be found. *The Act is like those which provide for the appointment of custodians for the real and personal property of an absentee.*

"In this case, though the money is on deposit with a bank, which has faithfully kept its contract, yet the statute proceeds on the general principle that corporations may become involved, or may be dissolved; or that, after long lapses of time, changes may occur which would require someone to look after the rights of the depositor. The statute deals with accounts of an absent owner, who has so long failed to exercise any act of ownership *as to raise the presumption that he has abandoned his property. And if abandoned, it should be preserved until he or his representative appears to claim it; or, failing that, until it should be escheated to the state. The right and power so to legislate is undoubted.*"

In *Security Savings Bank* v. *California*, 263 U. S. 282, 68 L. ed. 301 (hereinafter referred to as the *Security Savings Bank* case), this court held valid as to state banks certain California statutes, the substantive provisions of which were, in the language of the court, as follows:

". . . If a bank account has not been added to or drawn upon by the depositor for more than twenty years, and no one claiming the money has, within that period, filed with the bank any notice showing his present residence, and the president or managing officer of the bank does not know that the depositor is alive, then the bank shall, upon entry of a judgment establishing these facts, deposit with the state treasurer the amount of the deposit and accumulations. The suit cannot be begun until after the expiration of the twenty years. The statute does not affect an immediate escheat upon the lapse of the twenty years. It provides for taking over the deposit when so adjudged in the action. A valid claim to a deposit, duly made at any time prior to entry of the judgment, prevents its transfer to the state. . ."

This court stated the reason for its holding as follows:

"Where the procedure is appropriate, neither the due process clause nor any right of the bank under the contract clause is violated by a law requiring it to pay over to the state, as depositary, saving deposits which have *long remained unclaimed*. . . . The contract of deposit does not give the bank a tontine right to retain the money in the event that it is not called for by the depositor. It gives the bank merely the right to use the depositor's money until called for by him *or some other person duly authorized*. If the deposit is turned over to the state in obedience to a valid law, the obligation of the bank to the depositor is discharged. . . . *It is no concern of the bank's whether the state receives the money merely as a depositary or takes it as an escheat.*"

In the face of the above decisions, appellants do not argue that the grounds set out in section 7[*] of this Act are not sufficient to support a presumption of abandonment. Their contention is that the procedure by which bank deposits are required to be voluntarily delivered to the state is defective, and therefore denies due process. They say the procedure is defective because the *depositor* is deprived of his deposits without notice, hearing or judicial decree. Respondents contend that the depositor is not even deprived of any property, but that if he is, he has several notices sufficient to satisfy due process, that he has a reasonable opportunity to be heard, and that his rights are better protected under a voluntary delivery of the deposit to the state than they would be if they were delivered pursuant to a court judgment.

Although the procedure under the Kentucky Act is not the same as that provided in the California statutes involved in the *Security Savings Bank* case, the holding in that case tends strongly to support the validity of the procedure outlined in the Kentucky Act. Under the California statutes the Attorney General is authorized to bring a suit *in Sacramento County* to establish the grounds of

[*] Section 393.060 to 393.100, inclusive, K.R.S.

dormancy on which the state takes the deposits. Personal service is made upon the bank.[35] Service upon the depositors is made by publication of the summons for four weeks in a newspaper of general circulation *published in Sacramento county.*[36] The main contention in the case was that the California statutes denied due process because of defects in the prescribed procedure. The bank argued that:

1. "If the proceeding is in personam, the law is invalid as to nonresidents of the state, since they are served only by publication; and it is invalid as to residents, because they are served by publication without a prior showing of the necessity for such service."
2. "If the proceeding is quasi in rem, the law is invalid as to all depositors and claimants, because there is no seizure of the res, or its equivalent; because the notice provided for is inadequate and unreasonable; and because it is binding only on parties to the action."
3. "If the proceeding is strictly in rem, the law is invalid, because it does not provide for such seizure of the res, nor give reasonable notice to depositors and claimants."

The court's answer to contention 1 was:

> "The proceeding is not one in personam—at least, not so far as concerns the depositor,"

and that under the circumstances no prior showing of the necessity for notice by publication was necessary. The court further held that publication of notice in a newspaper having general circulation in Sacramento County instead of in a newspaper having general circulation in the

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[35] Under the Kentucky Act, personal service upon the bank is not necessary because the banks initiate the proceedings by making a report of such property. The banks do not contend in this case that they do not have adequate notice.

[36] It should be observed that publication of notice is not required in the bank where the deposit is located or the place where the depositor resides.

county in which the bank was located, was, *under the circumstances*, adequate constructive notice.

The court's answer to contentions 2 and 3 was:

> "But whether the proceedings should be described as being in rem or as being quasi in rem is not of legal significance in this connection. In either case the essentials of jurisdiction over the deposits are that there be seizure of the res at the commencement of the suit; and reasonable notice and opportunity to be heard. These requirements are satisfied by the procedure prescribed in the statutes of California. There is a seizure or its equivalent. . .
>
> "Seizure of the deposit is effected by the personal service made upon the bank."

The deposit is likewise effectively seized under the Kentucky Act when it is reported by the bank because at that time the bank becomes obligated to hold the deposit for the state unless the affidavit referred to in section 8[17] of the Act is made. Hence, the *Security Savings Bank* case clearly supports the validity of the Kentucky Act.

It is also clear from the aforesaid Supreme Court decisions that a state may take, pursuant to *judicial proceedings*, on constructive notice, either *custody of* or *a defeasible* title to *deposits* in state banks *on the sole ground that they have been dormant or inactive in the sense that there has been no act of ownership relative to them for a long period of time.*[18]

There is also good authority to the effect that *mere custody* of deposits may be taken by a state from motives of public policy *without judicial proceedings* and without notice by *publication*. *Brooklyn Borough Gas Co. v. Bennett*, 277 N. Y. S. 203; *Commonwealth v. Dollar Savings Bank*, 259 P. 138, 1 A. L. R. 1048; *State v. Security Savings*

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[17] Section 393.110, K.R.S.

[18] It has recently been held that absolute title cannot be taken on such ground *without judicial proceedings*. State v. Phoenix Savings Bank & Trust Co., — Ariz. —, 132 P. (2d) 637.

Bank, 154 Pac. 1070, (annotated in 1 A. L. R. 1054 at 1056); *Braun* v. *McPherson*, 277 Mich. 396, 269 N. W. 211. Also see *Color* v. *Corn Exchange Bank*, 250 N. Y. 136, 65 A. L. R. 879; affirmed in *Corn Exchange Bank* v. *Color*, 280 U. S. 218, 65 L. ed. 403; *Commercial Trust Co.* v. *Miller*, 262 U. S. 51, 67 L. ed. 858. However, these cases may not hold that the property can be taken without any form of constructive notice. We find no decisions of this court to the contrary.

In *Brooklyn Borough Gas Company* v. *Bennett*, *supra*, there was in issue the validity of a statute which required public utility companies to turn over to the state deposits made by consumers to guarantee payment for service rendered when such deposits were not claimed within ten years after the service ceased. The statute did not require any judicial proceedings or publication of any notice before delivery of the deposits to the state. However, the owners of the deposits were entitled to claim them from the state without any limitation of time. The court held the statute valid and on the question of due process said:

> "Though notice by publication as well as seizure is necessary in rem to make a sentence in such proceeding binding on the whole world, such sentence is one which usually affects ownership by transferring or extinguishing rights or interest in or to the thing subject to the jurisdiction. Where, however, title or ownership is unaffected and custody only is involved a different situation is presented. It is one thing to have jurisdiction to take the custody of property and another to have jurisdiction to hear and determine a sentence. Seizure before publication justifies taking the custody of the res and preserving it, but notice by some other method must supplement seizure before sentence or condemnation."

In *State* v. *Security Savings Bank*, *supra*, the court considered the validity of a statute which required banks to deliver to the state treasury deposits over which there had been no act of ownership for twenty years. The statute required no publication of notice or court proceedings,

but, as construed by the court, allowed the owners of the deposits to claim them from the state at any time before they were finally disposed of by a subsequent proceeding taken upon notice. It was contended that this statute denied due process of law. The court held the statute valid and on this contention said:

"In the consideration of this question it is to be noted at the outset that the section of the Bank Act under review does not contemplate any change in the ownership of the funds in question. It purports to deal with possession only, and to leave the matter of their ultimate ownership to be determined by such subsequent proceedings as are provided through the reference in the section to the provisions of section 1234 of the Code of Civil Procedure. . . Reading section 15 of the Bank Act as a whole it must be evident that its only purpose and effect in providing for the summary taking over of unclaimed deposits by the state treasurer is to merely work a temporary change in their possession until such time as they may be claimed by their owners, or as the more ample procedure for their ultimate disposition outlined in section 1234, Code of Civil Procedure, can be set in motion; or, in other words, to place such unclaimed deposits in custodia legis until their ownership can be adjudicated by a proceeding taken upon such notice to all concerned as would amount to due process of law, and thus render the adjudication as to the ultimate control and ownership of the property in question binding upon all persons interested.

". . . When the state, from motives of public policy, enacts a law providing that private property may be summarily seized and temporarily sequestered to await the inception or determination of a more formal proceeding affecting the title and ownership of the property so taken, neither the immediate possessor nor the actual owner can be heard to urge the objection that the summary seizure of the property by properly constituted public authorities has been accomplished without such notice as would constitute due process of law. . .

". . . *It is difficult to see what useful purpose was*

it is expressly stated that there is no deprivation of property within the meaning of the constitution when the state, from motives of public policy, takes custody or possession only of dormant, unclaimed bank deposits or similar property to conserve it for the benefit of the owner. Do the courts mean by this or similar expressions that there is no deprivation or do they mean merely that the deprivation is not unconstitutional? Of course, if there is no deprivation, no notice is required under the due process clause, for that clause only applies when there is a deprivation.

At least, *all* these state court cases stress the fact that the deprivation, *if any*, is slight and that seizure of the res alone is adequate constructive notice *in view of the object and extent of the deprivation*. There can be little doubt that they are sound in this respect because, if, as was held in the *Security Savings Bank case*, seizure of the res is notice sufficient to sustain a transfer of a *defeasible title* to dormant bank deposits, it stands to reason that seizure of the res is sufficient to sustain a mere transfer of *custody*. This is not a new principle of law enunciated in these cases; they merely apply an old principle which is the very foundation of all in rem proceedings. See *Den Murray & Kayser* v. *The Hoboken Land & Improvement Co.*, 59 U. S. 272, 15 L. ed. 372; *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. ed. 565 at 570; *Public Clearing House* v. *Coyne*, 194 U. S. 492, 48 L. ed. 1092; *Samuels* v. *McCurdy*, 267 U. S. 188, 69 L. ed. 568; *The Mary* 8 *Cranch* 388, 3 L. ed. 123 at 141; *Hollingsworth* v. *Barbour*, 4 *Peters* 466, 7 L. ed. 463 at 474; *Coler* v. *Corn Exchange Bank*, 250 N. Y. 136, 65 A. L. R. 879, affirmed in *Corn Exchange Bank* v. *Coler*, 280 U. S. 218.

The New York Court, in *Coler* v. *Corn Exchange Bank*, *supra*, (65 A. L. R. 879 at 885), held valid a statute which authorized public officers to seize without service of notice the bank deposits of an absconding husband for the

benefit of his family. Speaking through Justice Cardozo, the court said with reference to *seizure of bank deposits:*

> "Seizure of the deposit at the instance of a public officer was warning to the owner that a proceeding was begun."[40]

This Court stated, in *Pennoyer* v. *Neff, supra*, cited with approval in the *Security Savings Bank* case at page 570 of the Law Edition, as follows:

> ". . . The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners; or, when the public is a party, to condemn and appropriate it for a public purpose. *In other words, such service may answer in all actions which are substantially proceedings in rem.*"

This Court stated, in *Hollingsworth* v. *Barbour, supra*, at page 926 of the Law Edition, as follows:

> ". . . the law regards the seizure of the thing as constructive notice to the whole world, and all persons concerned in interest are considered as affected by this constructive notice."

This Court stated, in *The Mary, supra*, at page 684 of the Law Edition, as follows:

> ". . . Where these proceedings are against the person, notice is served personally, or by publication; where they are in rem, notice is served upon the thing itself. This is necessarily notice to all those who have any interest in the thing, and is reasonable because it

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[40] We especially recommend this case and the *Brooklyn Gas* case to this court for reading in full.

> is necessary, and because it is the part of common prudence for all those who have any interest in it, to guard that interest by persons who are in a situation to protect it. Every person, therefore, who could assert any title to The Mary, has constructive notice of her seizure, and may fairly be considered as a party to the libel."

Thus, it is clear that the aforesaid state court decisions in holding that seizure of the res is adequate notice are fully in accord with the decisions of this court generally relating to in rem proceedings.

It is also indicated in some of these state court decisions that seizure of the res is not the only adequate notice which the owner of property presumed abandoned has but that the Act itself is adequate constructive notice to him. See *State* v. *Security Savings Bank, supra,* and *Commonwealth* v. *Dollar Savings Bank, supra.* This principle was also recognized in *Coler* v. *Corn Exchange Bank, supra,* wherein the court, speaking through Justice Cardozo, said:

> ". . . If there was need of other warning to supply him with an opportunity for a hearing, it was given by the statute. The statute told him, a resident of the state, that the proceeding would come on for hearing at the next term of the County Court. This might be adequate notice or inadequate according to the circumstances. . . . If the term next appointed gave a reasonable opportunity to the owner to appear and defend, he is not aggrieved though in other circumstances the time might be too short. The burden is on the defendant to show that notice was inadequate."

It is the prospectiveness of the Act, plus the fact that the owner is presumed to be familiar with its provisions, which makes it adequate notice. Any person having knowledge of the Act knows that he may, by exercising any of several simple remedies available to him, preclude the Act from affecting his property in any way. Any bank depositor is presumed to know that if is deposit is allowed

to become dormant in the manner set out in section 7[11] of the Act, the bank will be required to report it to the state. He knows that any written transaction between the bank and himself relative to the deposit will take it completely without the purview of the Act. Numerous written transactions can be made without changing the status of the deposit in any way. This is the most simple, inexpensive remedy one can imagine. Even after the report is made, he has at least *sixty days* (60) in which to mail the affidavit described in section 8[12] of the Act, to the state, and this affidavit will preclude delivery of the property to the state. What more simple, inexpensive remedy can the depositor have than this?

The time for pursuing these remedies is more than adequate. The Act became effective June 12, 1940. The report was not due until September 1, 1940, and delivery of the property was not due until November 1, 1940. Hence, the owner of a deposit which would be reportable during that year had from June 12, 1940, to November 1, 1940, to pursue one of these remedies. For years subsequent to the effective date of the Act, the owner of such deposits would have the time necessary to give rise to the presumption of abandonment in which to make a transaction in writing which would take them out of the statute. For example, if the statute provides that a deposit dormant for twenty years is presumed abandoned, the owner of a deposit nineteen (19) years dormant at the effective date of the Act has one (1) year in which to act, and the owner of a deposit fifteen (15) years dormant on that date has (5) years.

Having knowledge of the provisions of the Act, the depositor may, in lieu of following any one of the remedies suggested above, resort to more expensive court proceed-

[11] Sections 393.060 to 393.100, inclusive, K.R.S.
[12] Section 393.110, K.R.S.

ings to obtain the same result, or he may let the state take the property and recover it from the state.

We are unable to find any logical reason for saying that the Act itself is not notice to a depositor who has knowledge of the existence of the deposit. The Act is also adequate notice whether a depositor has knowledge of the existence of the deposit or not, because it affords him, by reason of the posted notice on the courthouse door, a convenient means of ascertaining the existence of the deposit. *39 Am. Jur. 238, sec. 12; 39 Am. Jur. 235, sec. 5.* If, however, the principle that the Act is notice, does not for any reason apply when the owner has no knowledge of the existence of the deposit, the Act certainly does not deny due process. In that event, the need and reason for the state's taking custody of the property to conserve it for him becomes a circumstance of such great significance that seizure of the res and the posting of the notice on the courthouse door surely would be adequate constructive notice.*

It is inconceivable that such depositor would raise his voice against this Act, or contend that he is being deprived of his property thereby, or that seizure of the res and the notice posted on the courthouse door are, *under such circumstances*, inadequate to satisfy due process. In fact, such depositor is already, as a practical matter, deprived of his property and will continue to be deprived thereof unless this Act effects a restitution.

Although the Kentucky Court of Appeals held that said notice on the courthouse door was not essential to the validity of the Act; it did not hold that said notice should not be given, as directed by the Act. It must, therefore, be given and we submit that, if this court should not agree with this conclusion of the Kentucky Court of Appeals, the question whether this courthouse door notice is ade-

* See Ballard v. Hunter (204 U. S. 241) and other cases cited at page 34 hereof.

quate to satisfy due process, becomes a matter for this Court to decide.

Because of this courthouse door notice, the Kentucky Act is much stronger from a due process standpoint than any of the statutes considered in *Brooklyn Borough Gas Company* v. *Bennett*, *supra*; *Commonwealth* v. *Dollar Savings Bank*, *supra*; *State* v. *Security Savings Bank*, *supra*; *Braun* v. *McPherson*, *supra*; *Coler* v. *Corn Exchange Bank*, *supra*; *Corn Exchange Bank* v. *Coler*, *supra*. As we have seen, taking of custody of property under the statutes involved in those cases was upheld *even though there was no posting or publication of notice*.

The existence of KRS 287.410[1] which requires newspaper publication of bank deposits five (5) years dormant was no doubt one of the reasons why the legislature selected the courthouse door notice in preference to some other form of notice.

If said section is complied with, ten (10) notices by newspaper publication must be issued in respect to a deposit payable on demand, and forty (40) such notices in respect to a deposit not payable on demand, before such deposits would even come within the purview of the Act under consideration. Thus, if the banks have performed their mandatory duty under said section, depositors have had more than ample notice by newspaper publication and it would have been unduly duplicative had the legislature required in this Act another newspaper publication. If, on the other hand, the banks have generally failed to com-

[1] KRS 287.410 provides:

"Every bank organized under this article or doing business under any law of this State, shall annually, in January, publish, in at least two issues of a newspaper published in the county in which the bank is located, a statement, under oath of its cashier, of all deposits made with it, and of all dividends and interest declared, and payable by it, which, at the date of such statement, shall have remained unclaimed by any person authorized to receive the same for five years, giving the time when, and the name of the person by whom the deposit was made, and the name of the person in whose favor the dividend or interest was declared, and when and from what source derived."

ply with said section, then, such failure was a circumstance which should have persuaded the legislature that some other form of publication would be more effective. Hence, no matter what the status of KRS 287.410 may be from the standpoint of whether it has been complied with or not, the legislature had good reason to provide for a different form of notice in this Act.

The following circumstances weigh heavily in favor of the adequacy of this courthouse door notice:

1. Said notice is non-expensive and results in no diminution of the property of the owner, and is, for that reason, in harmony with the primary object of the Act to preserve *all* the property; whereas, newspaper advertising is so expensive that good policy would require that it be passed on to the property owner, and would, therefore, result in a diminution of the property sought to be preserved. See *Dohany* v. *Rogers, infra; Jacobs* v. *Roberts, infra; Ballard* v. *Hunter, infra; 12 C. J. 1232, sec. 1006.*

2. Said notice is an ancient form of notice and was used in the very earliest escheat statutes of this State. This courthouse door notice is a well recognized and commonly used form of notice. *39 Am. Jur. 251, sec. 31; 2 A. L. R. 1008.* It was employed in the very earliest escheat statutes of the State of Kentucky, at least as early as 1842. See *Revised Statutes of Kentucky of 1852, p. 458, ch. 34.* The fact that a form of notice or remedy is ancient is always an important factor in favor of its validity so far as concerns due process. *Corn Exchange Bank* v. *Coler, supra; Ownbey* v. *Morgan*, 256 U. S. 94, 65 L. ed. 837, 17 A. L. R. 873.

3. To have required further newspaper publication would have resulted, to a considerable extent, in a duplication of a valid subsisting statute (KRS 287.410) *which the legislature is entitled to presume will be respected*, whether it has been complied with or not.

4. The taking of property (if, indeed, any taking there be) is negligible.

5. The Act is a police measure and not subject to as rigid a due process test as might otherwise be the case.

6. *The Act itself puts all persons on notice of the time when and the place where the copy of the report will be posted, and thereby greatly increases the chances that any person interested in such property will be on the lookout for the same. This fact alone distinguishes this particular notice from notices usually given by publication in connection with court proceedings, and should establish the adequacy of the notice.* Statutes generally do not notify the owner of property when a proceeding in rem will be brought or what the nature of the proceeding will be. In other words, the owner must run the risk that he will by chance see any publications which are issued. But under this Act there is no such risk, for if the property owner is vigilant he can always go to the proper place at the proper time and obtain full information, or he can write the proper state department and procure the desired information. This is true because the Act fully and timely apprises the owner of the nature of the annual proceedings under the Act, and of the time and place where they will be commenced, and when the courthouse door posting of the report will be made.

The legislature of Kentucky, recognizing that other notices exist and considering all the circumstances, has expressly declared that said notice "shall be constructive notice to all interested parties and shall be in addition to any other notice provided by statute or existing as a matter of law." This provision is constitutional if, *all the circumstances being considered*, the legislature had any reasonable basis for it. Appellants have a burden of showing that no such basis exists (*Coler v. Corn Exchange Bank, supra*), but they have not made any attempt to do so. They just say that it is inadequate without giving any reason for their conclusion.

We again emphasize the fact that this court held in the *Security Savings Bank case* that newspaper publication in the capital city of the State of California was sufficient notice to authorize that state to take a defeasible title to bank deposits located anywhere in the state. In reaching that conclusion, the court gave considerable weight to the fact that California had a statute very similar to KRS 287.410.

It is logical to assume, as a general proposition, that the posting on the courthouse door or bulletin board required by the Kentucky Act would be more likely to come to the attention of interested parties than publication in a local newspaper in Frankfort, Kentucky, the state capital. This is true because such posting is made in the county where the property is located and where the depositor, his relatives, and his friends are more likely to be. It would be drawing the line of distinction rather fine to say that the State of Kentucky can take a defeasible title to a bank deposit located in the remotest county of the state by publication of a notice in a Frankfort paper; but that it can not take mere custody of such deposit by posting a notice on the courthouse door in said county *pursuant to a statute which notifies the depositor and everyone else of the time when and the place where the publication will be made*. We do not believe that this court will draw any such distinction. In fact, we think the notice provided in this Act for the taking of the mere possession of property is more likely to be seen by the property owner than is the notice provided in the California statutes for taking a defeasible title to property, which was held adequate in the *Security Savings Bank case*. Thus, it appears that that case alone is sufficient to overcome appellants' contention that the Act denies due process.

In deciding any due process question, it is fundamental that this court will take into consideration the *object* of the taking of property, the *extent* thereof, *and all the other circumstances of the case*. *Dohany* v. *Rogers*,

281 U. S. 362, 74 L. ed. 904; *Jacob* v. *Roberts*, 223 U. S. 261, 56 L. ed. 429; *Ballard* v. *Hunter*, 204 U. S. 241, 51 L. ed. 461; *12 C. J. 1232, sec. 1006.*

In *Ballard* v. *Hunter*, *supra*, this court said:

"In passing upon the other contentions of plaintiffs in error, we are brought to the consideration of what is due process of law. A precise definition has never been attempted. It does not always mean proceedings in court. Den ex dem. Murray v. Hoboken Land & Impro. Co., 18 How. 272, 15 L. ed. 372; McMillen v. Anderson, 95 U. S. 37, 24 L. ed. 335. *Its fundamental requirement is an opportunity for a hearing and defense, but no fixed procedure is demanded.* The process or proceedings may be adapted to the nature of the case. Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; Lent v. Tillson, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Iowa R. C. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344.

"In Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616, a proposition was laid down which has since been quoted many times. The court said, at pages 104 and 105, L. ed. on pages 619 and 620: 'That whenever, by the laws of a state or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person or *such proceeding in regard to the property as is appropriate to the nature of the case*, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.' And Mr. Justice Bradley, in a concurring opinion, said, on pages 107 and 108, L. ed. on pages 620 and 621, 'that, *in judging what is 'due process of law,' respect must be had to the cause and object of the taking*, whether under the taxing power, the power

of eminent domain, or the power of assessment for local improvements, or none of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law,' but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.' Such an examination may be made without interfering with that large discretion which every legislative power has of making wide modifications in the forms of procedure in each case, according as the laws, habits, customs, and preferences of the people of the particular state may require'."

Applying the above test of due process, this court has frequently held that, *under certain circumstances*, the "*object* or *cause*" of the taking" may be such that property can be utterly destroyed without any notice to the owner. See *Miller* v. *Schoene*, 276 U. S. 272, 72 L. ed. 568; *Sentell* v. *New Orleans & Carrollton R. R. Co.*, 166 U. S. 698, 41 L. ed. 1169; *Lawton* v. *Steele*, 152 U. S. 133, 38 L. ed. 385.

The state court decisions cited by the Kentucky Court of Appeals in its opinion appearing in 293 Ky. 735, *supra*, as sustaining its conclusion that the Kentucky Act does not deny due process, placed great emphasis on the fact that the *cause* or *object* of the taking of property under the statutes involved in those cases was to conserve the property and that the deprivation, if any, was slight. Thus, it appears that those cases are in accord with the numerous decisions of this court dealing generally with the due process clause of the Federal Constitution. *The soundness of these cases and other cases relied on in this brief is manifested by the fact that appellants have not in the Kentucky Court of Appeals or in this court at any time attempted in their briefs to assail the reasoning of those cases.* Appellants merely say, without citation of authority, that a bank deposit may not be taken without a judicial determination. It is fundamental that due process only requires that a property owner be given a rea-

sonable opportunity for a hearing and defense and that no fixed procedure is necessary. See *Ballard* v. *Hunter*, *supra*. That such opportunity is given under this Act with respect to property voluntarily delivered to the state, we summarize below some of the remedies available to both the depositor and the bank:

1. A bank depositor may write a note to the bank requesting it not to report the deposit. This is a written transaction in respect to the deposit, which would remove it entirely from the purview of the Act. Such transaction leaves the deposit *status quo*, so the depositor suffers absolutely no loss or expense. He may obtain the same result by other transactions in respect to the deposit.

2. Even after the property has been reported, any property owner may preclude its delivery to the state by making a simple affidavit.

3. Even after the property is delivered to the state, the owner can get it *all back*.

4. The owner can *bona fide* decline to deliver the property and force the state to sue for custody thereof.

5. Aside from the above remedies, the owner or the person reporting the property may resort to the courts for injunctive relief. This, alone, is sufficient to satisfy due process. *Commonwealth* v. *Hargis Bank & Trust Co.*, 233 Ky. 801, 26 S. W. (2d) 1045; *Willis* v. *Lafayette-Phoenix Garage Co.*, 202 Ky. 554, 260 S. W. 364; *Samuels* v. *McCurdy*, 267 U. S. 188, 69 L. ed. 568. He can also decline to make delivery of the property in the manner provided in section 20[*] of the Act.

6. If the bank or holder of the property turns it over to the state under a mistake of fact, the depositor or owner would, as a matter of law, have all the rights against the bank or holder that he ever had, and in addition, would, under the terms of the Act, have a right to recover the

[*] Section 393.290, K.R.S.

property *in toto* from the state. He would have no rights against the bank after an erroneous court adjudication that the deposit is dormant. Therefore, he has more protection when property is voluntarily delivered to the state than when it is delivered pursuant to a court judgment.

7. The bank or holder of the property may recover from the state any loss or damage which it may suffer by compliance with the Act. This is expressly provided in section 10[15] of the Act. Furthermore, if a bank were required to reimburse a depositor for any deposit it had turned over to the state, it would, on the doctrine of subrogation, succeed to any right of the owner against the state.

These remedies are not only adequate but appear to us to be about the best that can be designed; at least, they meet all tests of due process. See *Dohany* v. *Rogers*, 281 U. S. 362, 74 L. ed. 904; *Ballard* v. *Hunter*, 204 U. S. 241, 51 L. ed. 461. Why, in view of these remedies, is a judicial proceeding necessary to determine that a deposit is dormant? Such determination could serve no useful purpose whatever, but it would result in expenditures and court costs when the very purpose of the Act is to conserve property. If, however, for some reason unknown to us, a judicial proceeding is necessary, as appellants contend, to determine that a bank deposit is dormant, *the fact should not be overlooked that sections 8[13] and 16[14] authorize a collective suit for that purpose and unquestionably provide adequate procedure therefor.* The procedure prescribed is that set out in the Kentucky Civil Code of Procedure and appellants have not even intimated that said Code procedure does not meet the test of due process. This is respondents' "trump card." The collective suit feature of this Act will undoubtedly save it from a due process standpoint should this Court reverse the Kentucky Court

[13] Section 393.130, K.R.S.
[14] Section 393.110, K.R.S.
[15] Section 393.230, K.R.S.

of Appeals and hold the requirement in this Act of a voluntary delivery to the state of property presumed abandoned to be invalid.

The true test of due process was stated in *Dohany* v. *Rogers*, *supra*, as follows:

> "The due process clause does not guarantee to the citizen of a state any particular form or method of state procedure. Under it he may neither [illegible] a right to trial by jury nor a right of appeal. [illegible] *requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it.*"

We think that every feature of the Act meets this test, and have no fear that this court will hold otherwise.

The National Bank Question

In considering the question whether this Act is unconstitutional as applied to national banks, we must bear in mind that it was the object and purpose of Congress to make national banks amenable to local laws so as to give them local strength. *First National Bank* v. *Missouri*, 263 U. S. 640, 68 L. ed. 486; *McClellan* v. *Chipman*, 164 U. S. 347, 41 L. ed. 461; *First National Bank of Elizabethtown* v. *Commonwealth*, 143 Ky. 816, 137 S. W. 518; *Commonwealth* v. *Clark County National Bank*, 187 Ky. 151, 219 S. W. 175.

In *McClellan* v. *Chipman*, *supra*, this court said:

> " . . . the purpose and object of Congress in enacting the national bank law was to leave such banks as to their contracts in general under the operation of the state law, and thereby invest them as Federal agencies with local strength, while, at the same time, preserving them from undue state interference wherever Congress within the limits of its constitutional authority has expressly so directed, or wherever

such state interference frustrates the lawful purpose of Congress or impairs the efficiency of the banks to discharge the duties imposed upon them by the law of the United States."

Thus, it is a general rule that national banks are subject to local statutes, and the Act in question is valid unless it comes within the exceptions to the rule.

The contracts of all national banks in Kentucky have their essence here and enjoy all the protection of the laws of this State. Although they are agencies of the Federal Government, they engage primarily in a local banking business for private gain to their stockholders, *and the Government which created them intended that they would assume the customary obligations incident to the business of banking,* one of which is, as held in the *Security Savings Bank* case, the obligation to pay a deposit to a person "duly authorized" to receive it. They are peculiar agencies of the Federal Government in that they are designed to operate mainly under State law. It is the negotiable instrument laws, the trust laws, and the general laws of the State under which they do most of their business and reap their profits. *Since it is the intention of Congress that national banks operate under local laws so as to have greater local strength, and since they do so operate, Congress intends for them to be amenable to State laws to a greater extent than are Federal instrumentalities as a general rule.*

The Act involved in this controversy is an integral part of the laws of this state relating to the descent and distribution of property and to the appointment of personal representatives. The parts of the Act which deal with such situations as where the owner of property dies intestate without heirs, or where an absent devisee fails to claim his legacy for such a period of time as to be presumed dead, or where there is an *actual* abandonment of property, are unquestionably essential to a complete and adequate law of descent and distribution. The parts of

this Act relating to dormant bank deposits and other unclaimed property over which there has been no act of ownership for a long period of time have been held by this Court to be similar in nature to the usual personal representative statutes. See *Provident Savings Institution* v. *Malone*, *supra*, the *Security Savings Bank case*, and *Corn Exchange Bank* v. *Coler*, *supra*.

It has not been alleged in appellants' petition nor has there been any proof taken in this case to the effect that this Act frustrates national banks in the performance of their governmental functions.

We concede that national banks are instrumentalities of the Federal Government and perform some governmental functions, but we have been unable to ascertain from the decisions of this Court or the Federal statutes with any degree of completeness the full governmental functions performed by national banks. We believe that appellants have the burden of alleging facts and adducing proof sufficient to show that this Act does materially and substantially interfere with some governmental function of national banks *in such a manner as to conflict with the national banking laws*. This, appellants have failed to do. Are there not bank experts whose testimony would be of some aid to the Court in determining whether this Act will have a substantial adverse effect upon national banks? Is not such adverse effect, if it exists, susceptible of proof? Would not an estimation of the volume of deposits affected by this Act be of importance to this Court? Can appellants have this Act held invalid as to national banks without even alleging and proving facts sufficient to show that the Act will impair "the efficiency of the banks to discharge the duties imposed upon them by the laws of the United States?" We think not, unless this Court can determine from judicial knowledge that the Act will have such an adverse effect upon national banks. We doubt that such a determination may be made entirely from the knowledge of the judiciary.

Assuming, however, that the effect of this Act on national banks is a matter which may be determined entirely by the court without any proof, respondents contend that the Act does not conflict with any of the governmental purposes or functions of national banks, but is actually beneficial to them.

There is nothing in the charter of national banks that makes the Act inapplicable to them, nor is there any Act of Congress which expressly provides that national banks are immune to such laws. Any immunity must, therefore, be implied.

It is well settled that a contract of deposit does not give banks a tontine right to keep deposits. In fact, all the banks are obligated to do is to pay deposits to the person "duly authorized" to receive them. See *Security Savings Bank* v. *California, supra.* National banks daily pay deposits to assignees, judgment creditors, payees, draftees, personal representatives, etc. Yet, we know of no Act of Congress which expressly requires them so to do. Apparently they do it because it is, and has always been, within the function and purpose of banks to pay deposits to the one legally authorized to receive them. It seems inherent in the banking business that deposits be paid to those lawfully entitled to receive them.

The State of Kentucky is "duly authorized" under this Act to receive dormant bank deposits as the personal representative of the owner and all parties having an interest therein. *Security Savings Bank* v. *California, supra; Provident Institution for Savings* v. *Malone, supra.* Thus, it would seem that *payment of dormant bank deposits to the State of Kentucky is in accord with and not contrary to the purpose of the national banking laws.*

There is no material difference between the contracts of deposit existing between state banks and their customers and those existing between national banks and their customers. Therefore, the *Security Savings Bank* case

clearly supports the proposition that a bank actually contracts to pay the deposit to the person "duly authorized" to receive it. How, then, can a national bank avoid paying a dormant bank deposit to the State of Kentucky in accordance with this Act without violating its contract? Will the courts hold that it is contrary to the national banking laws to require a national bank to perform its contract?

We would have no difficulty with this question but for the fact that this Court has held in *First National Bank of San Jose* v. *California*, 262 U. S. 366, 67 L. ed. 1030,[49] that the same California statutes which were held applicable to state banks in the *Security Savings Bank case* could not be applied to national banks. *We do not see how those two cases can be reconciled.* However, we have only an academic interest in this question.

There is a significant difference between the substantive provisions of the Kentucky Act and the California statutes. For this reason, the case at bar is not governed by the *San Jose case*, and we have no real reason to contend that the *San Jose case* should be overruled although we believe that it is unsound in principle.

In the first part of the opinion in the *San Jose case*, the court pointed out that the Supreme Court of California declined to express an opinion upon the question whether the California statutes effected a present *escheat* of the rights of depositors or whether they have the right under section 1272 of the California Code to prosecute an action to obtain payment of their deposits from the state within five (5) years. Thus, this Court was required to consider the Act as if it effected a *confiscation* of the deposit by failing to allow a depositor any right to recover the deposit from the state.

After making this observation, the Court makes no further direct reference to the confiscatory feature of the California law until near the end of the opinion where it

[49] Hereinafter referred to as the *San Jose case*.

states that "the success of almost all commercial banks depends upon their ability to obtain loans from depositors *and these might well hesitate to subject their funds to possible confiscation.*"

The Kentucky Court of Appeals, after carefully considering this opinion, has concluded that these California statutes were held inapplicable to national banks solely because of the adverse effect which this confiscatory feature of the California statutes would have upon the receipt of deposits by national banks. In this conclusion, we believe the Kentucky Court is sound.

This Court stated in the *San Jose case* that the California statute

> "obviously attempts to qualify *in an unusual way* agreements between national banks and their customers, long understood to arise when the former received deposits under their plainly granted powers."

This statement, when thoroughly analyzed also shows clearly that the vice in the California statutes was their confiscatory feature. When making this statement, the Court had in mind the general principle of law that statutes, whether enacted before or after a contract of deposit is made, *become a part thereof the same as if copied therein.* See *Veix* v. *Sixth Ward Bldg. & Loan Assoc.*, 310 U. S. 32, 84 L. ed. 1061; *Home Bldg. & Loan Assoc.* v. *Blaisdell*, 290 U. S. 398, 78 L. ed. 413, 88 A. L. R. 1481; *Stephenson* v. *Binford*, 287 U. S. 251, 77 L. ed. 288, 87 A. L. R. 721. But, the Court placed emphasis on the *unusual way* in which the contracts were qualified and not upon the fact that they were qualified.

The contracts with the statutes read into them would provide that when a depositor fails for twenty (20) years to make some transaction of record indicating ownership of his deposit, the deposit, for that reason, would be subject to *outright escheat* by the state. This was the *unusual*

way in which the court found that the statutes attempted to qualify the contracts. The court said that this unusual qualification of the contract "might" have the effect of causing people not to make deposits in banks because of fear of *possible confiscation. Thus, the statutes were held invalid not because of any qualifying effect which they would have on the contracts as such but because of the effect the confiscatory provisions in the contracts, as qualified, would have on the business of the banks—the curtailment of the making of deposits.* It was not even contended in the case that the California statutes impaired the obligation of contracts in violation of Article 1, section 10 of the United States Constitution.[30]

At page 37 of appellants' brief appears the following statement: "The vice in the California statute which this court said constituted an interference with the National Banking Act *was the attempt by California to say how long a national bank could retain a deposit whether active or inactive.*" The basis for this statement is found in the following excerpt from the opinion of the San Jose case, also quoted at page 37 of their brief:

> "If California may thus interfere other states may do likewise: and instead of twenty years, varying limitations may be prescribed—three years perhaps, or five, or ten, or fifteen. We cannot conclude that Congress intended to permit such results."

Examination of the language of the opinion preceding this excerpt discloses that the words "*thus interfere*" relate to the sentence wherein the court points out that the statutes interfere with national banks by qualifying their contracts in *an unusual way*. The words "such results" also relate to the qualification of contracts *in an unusual way*. Hence, the language seized upon by appellants does

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[30] If, however, we are in error in this view and the California statutes were actually held invalid in the San Jose case because they impaired the obligation of contract (such reasoning is repudiated in toto by the *Security Savings Bank* case.

not support the interpretation which they seek to place upon it. When the words "three years perhaps, or five, or ten, or fifteen," are read in conjunction with the rest of the opinion, it is evident that the court had in mind only statutes which attempt to qualify the contracts of deposit by providing that deposits *may be confiscated on the mere ground that they have been dormant for the suggested periods of time.* This is the kind of statutes which the court said would be invalid.

The gist of appellants' interpretation of the *San Jose case* is that this court held the California statutes invalid as to national banks because those statutes attempted "to say how long a national bank could retain a deposit whether *active* or inactive."

The California statutes had no provision relative to *active* deposits and we do not find any basis in the opinion for saying that this court read any such provision into them. Neither do we find any basis in the opinion for saying that this court held, as an abstract proposition of law, that a state may *under no circumstances* take mere *custody* of a dormant bank deposit irrespective of the length of time during which it has been dormant. We do not think the court so held for three reasons: (1) There were no facts before the court on which it could have based any such holding; (2) no reason was assigned in the opinion for any such holding; and (3) there is no language in the opinion out of which such holding can reasonably be deduced.

We find absolutely nothing in appellants' brief which shows that the Kentucky Court of Appeals was in error when it construed the *San Jose case* as holding the California statutes inapplicable to national banks *solely* because they authorized the state to confiscate dormant bank deposits and *might* for that reason have the effect of causing people not to place deposits with national banks.

Appellants argue that there is no substantial difference between the Kentucky Act and the California stat-

utes because under the Kentucky Act, the state is authorized by section 16[1] thereof to file a suit to establish a defeasible title to deposits after it has them in custody; whereas, the State of California did the same thing in one proceeding. The crux of this argument is that the State of Kentucky does in two steps the same thing which the State of California attempted to do in one step. This argument is fallacious because under the Kentucky Act property is never *escheated* or *confiscated* on the ground of mere dormancy, while under the California statutes property is escheated on such ground. Anderson National Bank, et al. v. Reeves, et al., 293 Ky. 735, 170 S. W. (2d) 350.

The second step to which appellants refer is a court proceeding to establish (1) death intestate of the owner without heirs or (2) *actual* abandonment. If such grounds are established, the state takes title to the property *subject to defeasance at any time within five (5) years.*

Appellants admit at page 25 of their brief that the state may escheat outright a deposit in a national bank on the ground that the owner has died intestate without heirs. See *Territory of Alaska* v. *First National Bank of Fairbanks*, 22 F. (2d) 377. If this is true, may the state not escheat a deposit held in its custody on the same ground?

Actual abandonment is historically as valid a ground for the state's taking title to property as is death intestate without heirs. See *1 Am. Jur. 2, sec. 3.* At any rate, the validity of this second proceeding is a moot question so far as concerns this case because, as previously noted, appellants admit that the validity of sections 3, 4, 5 and 6[2] of the Act are not in issue on this appeal; and the Kentucky Court of Appeals has held that their validity was not in question on the appeal before it.

In view of these considerations, the conclusion is inescapable that the Kentucky Court of Appeals has prop-

[1] Section 393.210, K.R.S.
[2] Sections 393.020, 393.030, 393.040, and 393.050, K.R.S.

erly held that the *San Jose case* is not on all fours with the case at bar and is not conclusive of the national bank question presented herein. Hence, the question whether this Kentucky Act is applicable to national banks is truly an open one.

What effect, if any, does this Kentucky Act have upon national banks that is foreign to the national banking laws or materially impairs their efficiency in performing their governmental functions? We know of none and appellants have brought none to the attention of this Court.

When a deposit is paid under this Act to the state as legal representative of the depositor, is the *effect* any different on national banks than when they pay a deposit to the committee of an insane person? In either instance the payment is made in accordance with their contract to the person "duly authorized" to receive it. *Security Savings Bank case*. Appellants attempt to distinguish the two situations by saying that in the case of an insane person, there is a judicial determination of insanity. This distinction is faulty because it puts the emphasis on procedure and not upon the *effect* which the law has on the bank.[34] In both instances the direct effect of the law upon the bank is that it loses the right to keep the deposit.

A statute which gives a state *absolute title* to bank deposits on the mere ground that they are dormant or inactive for a designated period of time, *might*, as stated by the court in the *San Jose case*, cause people to refrain from placing deposits with banks, but this is a rather speculative reason on which to base the invalidity of a state statute. However, the Kentucky Act, which authorizes the state to take *mere custody* of deposits *on such grounds* for the benefit of *all persons having an interest therein*, would clearly not cause people to refrain from making deposits

[34] The procedural question has been considered herein under the heading due process. The question now under consideration is: Assuming the procedure is appropriate, does the Act conflict with the national banking laws?

because of any apprehended fear of confiscation. On the contrary, it seems that the Act *might* cause people to make bank deposits for the following reasons:

(1) It would protect depositors against loss of their deposits from forgetfulness.

(2) It would protect depositors against loss of their deposits in case they, through negligence or inadvertence, lose trace of it.

(3) It would result in the placing of unclaimed deposits in a centralized place where a person could, by making a single inquiry, ascertain the existence of such property.

The attributes of the Act enumerated above show how foreign the idea of confiscation is to the Act.

This Act confers benefits on national banks as well as on their depositors. Without such legislation, what legal disposition can be made of an unclaimed deposit? Even if a deposit has been dormant for two or three hundred years, a national bank cannot legally write it off its books as a profit without the sanction of a state statute, because the Federal Government has no power to escheat property outside its territorial jurisdiction and, therefore, may not confer such power on national banks. *American Loan Co. v. Grand R. Co.*, 159 Fed. 775. Both public policy and good business practices would seem to require that some final disposition of such property be made.[*] One of the incidental effects of this Act is to give the banks a means of closing such accounts.

Appellants have not even attempted in argument to point out to this court any specific manner in which the substantive provisions of this Act conflict with the national banking laws. They bottom their case entirely on the

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[*] The necessity for a statute similar to this Kentucky Act is manifested by the numerous State statutes dealing solely with unclaimed bank deposits, not to mention statutes dealing with other classes of unclaimed propery. See amicus curiae brief of the State of Minnesota (joined in by State of Wisconsin) at page 16.

San Jose case.[55] It is true that they rely on *American National Bank of Nashville, et al.*, v. *Clarke, Superintendent of Banks*, 135 S. W. (2d) 935, 175 Tenn. 480; *Starr, Attorney General* v. *O'Connor, Comptroller of the Currency, et al.*, 118 F. (2d) 548 (6 C. C. A.). Certiorari denied, 314 U. S. 695; *National City Bank* v. *Philippine Islands*, 302 U. S. 651. *But, those cases in turn rest entirely upon the San Jose case.* Since we have clearly distinguished that case from the one at bar, those cases also stand distinguished.

The case at bar presents just one aspect of the general question of intergovernmental immunities. For the past decade this Court has been growing more reticent in its application of the doctrine of intergovernmental immunities as a ground for holding invalid state or federal statutes. There is an escheat case, *United States* v. *Klein*, 303 U. S. 276, 82 L. ed. 840, which is a good example of this trend. In that case this court held that the State of Pennsylvania could escheat funds paid to the United States Treasury pursuant to Federal statutes (R. S. 996) which require the Federal District Courts to pay to the Treasury unclaimed deposits held by them for five (5) years. The statutes further provide that the owner of any funds which have been delivered to the Treasury may obtain a refund on proving his claim before the District Court which paid the money to the Treasury. The State of Pennsylvania, pursuant to its escheat law, obtained a judgment in a State court for certain funds in the United States Treasury. Pennsylvania filed that judgment with the proper District Court, and that Court recognized the judgment of

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[55] Appellants do make some fuss about the penalty provision in section 20 of the Act. Their point in connection with this provision is rather vague. The legislature probably put this provision in the Act because it had learned from experience with KRS 287.410 that it would not be complied with unless there was some enforcement provision. Attention is called to the fact that the penalty is for "refusing", not "failing" to make a report and that any person may under the terms of the Act, *although refusing to make the report*, be relieved of any threat of penalty by making a compliance bond.

the State Court and ordered that the Treasury surrender the funds to the State of Pennsylvania. The District Attorney excepted on the ground that such procedure was an interference with a Federal instrumentality. The United States Supreme Court sustained the decree of the District Court on the ground that it was no interference with the instrumentality to require it to pay money to the person *lawfully entitled to receive it.*[5] There is no substantial distinction between this case and the one at bar.

A rather complete re-examination and overhauling of the doctrine of intergovernmental immunities was made in, *Graves* v. *New York*, 306 U. S. 465, 83 L. ed. 927. In that case, the Court reconsidered *Collector* v. *Day*, (Buffington v. Day) 11 Wall 113, 20 L. ed. 122, and *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401, 81 L. ed. 306, and overruled them in "so far as they recognize an implied constitutional immunity from income taxation of the salaries of officers or employees of the national or state government or their instrumentalities."

Mr. Justice Stone delivered the opinion for the Court, and speaking with reference to taxing powers of the state, said:

> ". . . The burden, so far as it can be said to exist or to affect the government in any *indirect or incidental* way, is one which the Constitution presupposes, and hence it cannot rightly be deemed to be within an implied restriction upon the taxing power of the national and state governments which the Constitution has expressly granted to one and has confirmed to the other. The immunity is not one to be implied from the Constitution because if allowed it would impose to an inadmissible extent a restriction on the taxing power which the Constitution has reserved to the state governments."

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[5] See also Territory of Alaska v. First National Bank of Fairbanks, 22 F. (2d) 377, wherein the Ninth Circuit Court of Appeals held the Territory of Alaska could escheat deposits in national banks on the ground that the depositor had died intestate without heirs

This case clearly indicates that state tax statutes will no longer be unconstitutional because of some "indirect or incidental" effect they may have on a federal instrumentality. The same should be true of any police statutes of a state because the police power of the state is the most essential and "the least limitable of the powers of government." *McDonald* v. *Mabee*, 243 U. S. 90, 61 L. ed. 608; *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539, 61 L. ed. 480; *11 Am. Jur. 974, sec. 248.*

The extent to which the whole doctrine of intergovernmental immunity was re-examined and overhauled in this case is indicated by Mr. Justice Frankfurter's concurring opinion therein. He points out that in *McCullough* v. *Maryland*, 4 Wheat 316, 4 L. ed. 579, Chief Justice Marshall expressed the unfortunate dictum that "the power to tax involves the power to destroy," and that that dictum came to be "treated as though it were a constitutional mandate" to such an extent that the court in several opinions held that certain state statutes interfered with federal instrumentalities and that certain federal statutes interfered with state governments although no material or substantial interference existed. Mr. Justice Frankfurter also states that:

> "All these doctrines of intergovernmental immunity have *until recently* been moving in the realm of what Lincoln called 'pernicious abstractions.' The net of *unreality* spun from Marshall's famous dictum was brushed away by one stroke of Mr. Justice Holmes' pen: 'The power to tax is not the power to destroy while this court sits.'"

What does all this language mean? Does it not mean that the degree of the interference will hereafter be the test and that the statutes of one government will not be stricken down under the doctrine of intergovernmental immunities because of some speculative or insubstantial effect they may have on the functions of the other government?

In the light of these recent decisions dealing with the doctrine of intergovernmental immunities, the *Security Savings Bank case*, *Provident Institution for Savings* v. *Malone*, *supra*, *United States* v. *Klein*, *supra*, and other decisions of this Court, we believe that the *San Jose case* is unsound in principle and concur fully in the view expressed in the *amicus curiae* briefs filed on behalf of the States of Minnesota (joined in by the State of Wisconsin) and Michigan to the effect that the case should be overruled.

However, it has been shown throughout this brief that an overruling of the *San Jose case* is not essential to a decision of this Court affirming the decision of the Kentucky Court of Appeals. The point we urge most is that the Kentucky Act is completely free of the vice which was attributed to the California statutes in the *San Jose case*, and that the Kentucky Court of Appeals has correctly held that the Act comes within the general rule that national banks are amenable to state laws. In fact, it is a statute of the character which Congress intended should be complied with by national banks, and it would, therefore, not be in conflict with the national banking laws even if it did, in an economic or business sense, lay some burden on national banks which is not the case.

National banks are required to pay their debts even though it may result in closing their doors, because Congress intends that their debts be paid. Personal representatives are among those to whom Congress intends that payment be made. Under the Act, the State of Kentucky acts as a personal representative when it receives dormant bank deposits. Hence, we insist that this Act not only does not conflict with the national banking laws, but Congress actually intends that national banks comply therewith.

CONCLUSION

It is respectfully submitted that the decision of the Court of Appeals of Kentucky should be affirmed.

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